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In the

Supreme Court of the United States

October Term 1952

No. 360

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner

v.

WILLIAM C. CHANCE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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v.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Atlantic Coast Line Railroad Company, a Virginia corporation, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in this case on July 18, 1952.

A.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, Paragraph (1). The

decision of the United States Court of Appeals for the Fourth Circuit was rendered on July 18, 1952.

B.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case has twice been before the United States Court of Appeals for the Fourth Circuit—*Chance* v. *Lambeth and Atlantic Coast Line Railroad Company* (Jan. 27, 1951), 186 Fed. (2d) 879, and *Atlantic Coast Line Railroad Company* v. *Chance* (July 18, 1952), not yet printed in the Federal Reporter System. Two questions have been involved: first, whether the rules and regulations of the petitioner, Atlantic Coast Line Railroad Company, requiring segregation by race of day coach passengers into separate day coaches of equal accommodations, facilities, and conveniences is valid; and second, if said regulation be valid, whether a day coach passenger who intentionally violates it is guilty under the law of Virginia of a misdemeanor.

There has been no issue of fact on any question save upon the one question whether the conductor of petitioner caused the respondent to be arrested, and for the purposes of this petition, as will subsequently appear, that factual issue is of no importance.

William C. Chance, the respondent, is a Negro citizen of North Carolina. He had purchased from petitioner a round trip ticket from Rocky Mount, North Carolina, to Philadelphia, Pennsylvania, and on the day in question he was on his return trip. He journeyed from Philadelphia to Washington by Pennsylvania Railroad and there changed cars and traveled by Richmond, Fredericksburg & Potomac Railroad to Richmond. At Richmond, as is customary, the R. F. & P. locomotive was disconnected and the employees of that

railroad left the train. The A. C. L. locomotive was connected and its employees took charge of the train, and from that point on it was an A. C. L. train.

When the train left Washington and when it left Richmond it was composed of five baggage and express cars and eleven passenger cars, which included five day coaches, a diner, and five Pullman cars, arranged in that order. The A. C. L. employees pursuant to the company's regulations set aside the three forward day coaches for Negro day coach passengers and the two rear day coaches for white day coach passengers.

There has fortunately been no issue in this case on the question whether the day coaches set aside for Negroes were in all respects equal to the day coaches set aside for white persons. In its first opinion the Circuit Court of Appeals stated: "The three forward coaches were equal in accommodation and comfort to the two that followed." Hence, there is no issue concerning complete equality of accommodations.

At Washington respondent was directed to the fifth or the rear day coach where he found a seat. During the ride from Washington to Richmond there were both white and colored persons in that day coach and there was no difficulty or disturbance.

At Richmond and while the cars were still standing in the station and after the Atlantic Coast Line crew had taken charge, the Atlantic Coast Line porters requested white persons seated in the three forward day coaches to move to one of the two rear day coaches, and colored persons seated in either of the two rear day coaches to move to one of the three forward coaches. Ample seats for all passengers were available, either by the window or the aisle and in seats with others or alone. All day coach passengers complied with the request save the respondent, Chance, who refused to move. After the train left Richmond, the assistant conductor, who

took up tickets in the rear day coach, requested respondent to move to one of the three forward coaches. He refused. The matter was reported to the conductor and just before the train left Petersburg, the first stop after leaving Richmond, the conductor requested respondent to move and respondent again refused. The first stop after Petersburg was Emporia, Virginia. The conductor wired ahead to Emporia asking that police meet the train. On arrival at Emporia police did meet the train, the conductor explained the situation to them, they requested respondent to move, respondent refused, and they told respondent he would have to leave the train. Respondent left the trainly quietly and the conductor returned his ticket to him. He was taken by the police to the police station and arrested under a warrant charging disorderly conduct. After a detention of about forty minutes he gave bond and completed his journey home by bus. A few days later he returned to Emporia at the appointed time for a hearing before the Magistrate. The conductor also appeared, withdrew the charges, and paid the costs pursuant to instructions given him by petitioner.

Respondent admitted his knowledge of the rule and regulation.

Petitioner introduced the testimony of the Commerce Counsel of the State Corporation Commission of Virginia, of a gentleman who for many years had been Director of Transportation and prior to that had been Executive Secretary of the North Carolina Utilities Commission, formerly known as the North Carolina Corporation Commission, and of a retired District Superintendent of petitioner in Florence, South Carolina, all of whom testified that the regulations of petitioner were in accord with the general sentiment of the community through which petitioner operates and with the usages and customs of the people throughout the territory in which petitioner operates and that the purpose of such

regulations was to promote the comfort of the passengers and to preserve the public peace and good order. Respondent on the other hand introduced testimony showing that following the decision of *Morgan* v. *Virginia* (1946), 328 U. S. 373, the R. F. & P., which operates only between Washington, D. C., and Richmond, Virginia, and some other roads operating in Virginia, had abandoned similar segregation regulations without giving rise to violence or disorder. Respondent also introduced testimony of a number of individuals who stated that they did not approve of segregation and did not believe it necessary. The evidence thus affirmatively discloses the well-known fact that in the area through which the Atlantic Coast Line operates there is a custom, tradition, and usage of separation of the races in the fields of transportation, education, theaters, restaurants, and most walks of life, all of which was admitted by respondent's witness Smith on page 124 of Vol. 1 of the original Record.

The evidence shows and there is no contradiction of the fact that under the rules and regulations of the Atlantic Coast Line conductors are directed thus to separate the day coach passengers at Richmond or as soon thereafter as possible, and that if the cars are crowded so that upon separation, seats are not available for all passengers, an effort is not made to separate until a crowded condition becomes relieved.

Segregation in Pullman and dining cars attached to petitioner's trains is not attempted because separate accommodations are not furnished.

The evidence shows without contradiction that in all the conversations between respondent and members of the train crew, and with the policeman, there was no loud talking, there was no unseemly conduct and there was no "manhandling".

Respondent sued petitioner and its conductor for alleged breach of contract, for alleged unlawful assault, for alleged unlawful ejectment from the train, and for alleged unlawful arrest and incarceration. Subsequently the case was dismissed as to the conductor because of lack of diversity of citizenship.

On the first trial of the case the District Court charged that a railroad company had the right to promulgate reasonable rules and regulations with respect to traffic over its lines, and that such rules and regulations may not be discriminatory; that if the conductor was acting to enforce a reasonable rule and regulation in a reasonable manner, such regulation being known to the respondent, and if the accommodations were equal, the conductor had a right to eject the respondent from the train upon his refusal to comply with the regulation, and the conductor also had the right to call police officers to his assistance. The Court further instructed that if the warrant for the arrest of the respondent was issued on the initiative of the police officers and not on that of the conductor, there was no liability upon the railroad for the arrest, but if it was issued at the instance of the conductor, the respondent having left the train peacefully when requested so to do by the officers, the conductor was not justified in causing the arrest even though the rule and regulation was reasonable.

After a period it became evident that the jury could not agree upon a general verdict. Whereupon specific inquiries were submitted to the jury, among others, whether the respondent was ejected from the train for violation of a rule and regulation which was known to him, and whether the rule and regulation was reasonable and was reasonably enforced by ejecting the respondent. The jury answered each of these questions in the affirmative. Another question was submitted, namely, whether the railroad caused the arrest.

The jury answered that it was unable to agree on an answer to that question.

At the conclusion of respondent's testimony and at the conclusion of all the testimony, petitioner had moved for a directed verdict, one of the grounds being that under the statutes and decisions of Virginia, i. e., Title 18, Section 208, of the Virginia Code, *Virginia Railway and Power Company* v. *O'Flaherty*, 118 Va. 749, and *Virginia Electric and Power Company* v. *Wynne*, 149 Va. 882, the respondent was a trespasser and was guilty of a misdemeanor, to-wit, he was a disorderly person, and that accordingly the arrest was rightful and it was immaterial whether the police officers or the conductor may have caused it.

Since the jury was hung upon the question of the arrest, petitioner stated that on that feature of the case it would stand on its motion for a directed verdict and requested the Court to instruct the jury to ascertain the amount of damages to which respondent was entitled if the arrest were lawful, and then to rule upon the question of the arrest on the motion for a directed verdict. This motion the Court adopted. The jury found the damages to be $50.00. The Court held as a matter of law that under the statutes and decisions in Virginia a passenger who failed to comply with the reasonable rules and regulations of the railroad was not guilty of a misdemeanor, and hence the arrest was wrongful, and it entered judgment against petitioner in the amount of $50.00.

Respondent appealed to the Circuit Court of Appeals upon the question of the validity of the rule and regulation. Petitioner filed a cross appeal upon the question of the validity of the arrest.

The Circuit Court of Appeals in *Chance* v. *Lambeth and Atlantic Coast Line Railroad, supra*, held that the rule and regulation of petitioner was an unconstitutional burden upon interstate commerce and was hence in violation of the Com-

merce Clause of the Federal Constitution. Since it held that the rule and regulation was invalid, it had no occasion to consider the question whether a passenger who violated a valid rule and regulation was guilty of a misdemeanor. The Court of Appeals further set aside the judgment of $50.00 against petitioner for the arrest, since in its opinion the matter was tried upon the erroneous theory that the regulation was valid and the verdict of the jury was necessarily affected thereby, and the case was remanded to the District Court for subsequent proceedings. In so far as the question of ejectment was concerned, those proceedings were to be confined to the question of the amount of damages therefor. In so far as the question of arrest was concerned it was remanded for a completely new trial on that question.

Petitioner thereupon applied to this Court for a writ of certiorari and stated:

> "Subsequent proceedings before the District Court upon the question of the ejectment are, of course, to be confined to the question of the amount of damages therefor, and for a complete new trial on the matter of the arrest. Hence, the decision of the Circuit Court is final upon the critical point of the validity or invalidity of the segregation rule and regulation, and of the right of the petitioner to adopt and enforce such regulation."

That petition for certiorari was denied by this Court on May 28, 1951—341 U. S. 941. We, of course, are not aware whether that petition was denied because the matter had not proceeded to final judgment or whether it was denied for other reasons.

On the remand to the District Court respondent, over petitioner's objection, was permitted to amend his complaint so as to allege a case for punitive damages. The District Court considered that the issue of the arrest had been decided finally against petitioner, and that the only question

before it was the amount of damages to which respondent was entitled for an unlawful ejectment and arrest. The District Court submitted to the jury the whole question of damages, both compensatory and punitive. Adopting in toto the respondent's evidence concerning the damages suffered by him, the jury found he was entitled to $55.00 compensatory damages and to no punitive damages, and judgment was entered accordingly.

Petitioner had kept alive (if it were not kept alive in the very nature of things) the question of the validity of the regulation and of the validity of the arrest, and specifically at the very conclusion of the proceedings in the District Court moved to set aside the verdict of the jury and enter judgment for the petitioner upon the ground that as a matter of law the petitioner had the right to adopt the rule and regulation and that the arrest was lawful.

From the judgment of the District Court petitioner appealed to the Court of Appeals, and stated that the issues involved were whether the rule and regulation was violative of the Commerce Clause of the Federal Constitution and whether a passenger who refuses to comply with a valid rule and regulation is guilty under the law of Virginia of being a disorderly person.

By per curiam opinion handed down on July 18, 1952, *Chance* v. *Lambeth*, *supra*, the Court of Appeals held that the appeal presented no new question for its consideration and that while on subsqeuent appeal it had the power to reverse a former decision, that power is to be exercised only under unusual circumstances. It held that no such circumstances were presented and the judgment entered by the District Court was affirmed.

Accordingly, on this occasion in presenting this our petition for a writ of certiorari, we bring to this Court a judgment which is final.

We do not in this petition raise before this, the Supreme Court, the question whether under the law of Virginia a passenger who violates a reasonable rule and regulation of a carrier is guilty of a misdemeanor. We do not raise it for two reasons; first, it is a question which does not involve Federal Constitution or Federal law; second, it has not as yet been passed upon by the Court of Appeals. Hence, we raise only the one question now to be stated.

C.

THE QUESTION PRESENTED

The question presented is whether a common carrier of passengers by rail violates the Commerce Clause of the Federal Constitution if it adopts and enforces against an interstate day coach passenger a rule and regulation that white and colored day coach passengers occupy separate coaches equal in all respects to one another, when such rule requiring such separation is in accord with the customs, traditions and usages of the people of the territory through which the carrier operates.

D.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1) The question presented is one of fundamental importance to common carriers, not only by rail but also by bus and steamship operating throughout a large area of the country, as well as to the people residing in that area, and to the country as a whole. In reliance upon the decisions of this Court in *Hall* v. *DeCuir,* 95 U. S. 485, and *Childs* v. *C. & O. Railway,* 218 U. S. 71, and in reliance upon the specific holdings of those decisions that such a regulation is valid and enforceable so long as the Congress refrains from

taking any action to the contrary, the carriers throughout wide areas of the country have adopted such rules and regulations and have enforced them. Racial questions have become among the most acute of the present day. The decision of the Court of Appeals denies the validity of a rule and regulation of a type which this Court has consistently declared to be valid until Congress may act to the contrary. Unless this point be now again decided by this Court a railroad or a passenger seeking to ascertain his rights will find the decisions of this the Supreme Court to the effect that such a rule and regulation is not violative of the Commerce Clause of the Constitution, and the decision of the Circuit Court of Appeals that it is violative of that Clause.

(2) The Circuit Court of Appeals has thus decided a Federal question in conflict specifically with the two decisions of the Supreme Court mentioned in the preceding paragraph. Its decision is also in conflict with the principle of law upon which those two decisions rest, to-wit, that the grant in the Constitution to Congress of the power to regulate interstate commerce of its own force, i. e., without action by the Congress, established the essential immunity of interstate commerce from direct control by the States with respect to those objections embraced within the grant which are of such a nature as to demand that, *if regulated at all*, the regulation is to be prescribed by Congress, and that until so regulated commerce *is free* from any restriction. That broad general principle is at the basis of and is the principle evoked by this Court in many cases, among others the *Minnesota Rate Cases*, 230 U. S. 352, 400, and *Southern Pacific* v. *Arizona*, 325 U. S. 761, 767.

(3) The decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the District of Columbia in the case of *Washington, Baltimore & Ohio Electric R. Co.* v. *Waller*, 289 F. 598.

We respectfully call attention to the fact that the denial of our former petition for writ of certiorari in this case does not impart any expression of opinion by the Supreme Court upon the merits of the case. *United States* v. *Carver*, 260 U. S. 482, 490; *Agoston* v. *Pennsylvania*, 340 U. S. 844.

Seldom does the Supreme Court give a reason for a denial of a writ. The denial may have been for any one of a number of reasons, including the reason that the judgment of the lower court was not final. *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912. The Court will at times refuse certiorari because the judgment sought to be reviewed is not final, but will grant it on subsequent application after final judgment has been entered. *Hamilton-Brown Shoe Company* v. *Wolfe Bros. & Co.*, 240 U. S. 251.

A supporting brief accompanies this petition.

Wherefore your petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered by that Court on July 18, 1952, that its judgment be reversed, that this case be remanded to it with direction that it consider and pass upon the question whether the respondent was guilty of a misdemeanor under the law and decisions of the Courts of Virginia.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Virginia and its supplemental opinion, each handed down at the conclusion of the first trial before that Court, are to be found beginning at pages 20 and 32, Volume 1, of the original Record. The opinion of the United States Court of Appeals for the Fourth Circuit rendered on the first appeal is found, *William C. Chance* v. *Lambeth and Atlantic Coast Line Railroad Company*, 186 F. (2d) 879. On the second trial of the case before the District Court, it handed down no opinion. The opinion of the United States Court of Appeals for the Fourth Circuit

handed down on the second appeal is found beginning at page 2, Volume 2, of the original Record. *Atlantic Coast Line Railroad Company* v. *William C. Chance,* not yet reported in the Federal Reporter System. Its judgment is at page 4 ~~thereof~~. of the printed record.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, paragraph (1). The judgment of the United States Court of Appeals for the Fourth Circuit to be reviewed was entered on July 18, 1952, and, of course, involves its judgment rendered on January 27, 1951.

III.

STATEMENT OF THE CASE

A statement of the case appears under heading "B" of the petition for writ of certiorari. In the interest of brevity this statement is not here repeated, but is referred to with the request that it be considered as incorporated herein by reference.

IV.

QUESTION PRESENTED

The question specifically brought forward by the petition for a writ of certiorari appears under heading "C" of the petition. Again the statement is not here repeated, but is referred to with the request that it be considered incorporated by reference.

V.

SUMMARY OF THE ARGUMENT

A carrier not only has the right, but it is under the duty, to adopt reasonable rules and regulations for the conduct of its business and for the convenience, comfort, and safety of its passengers, subject, of course, to the paramount power of Congress to regulate matters of interstate commerce. In the absence of law or valid governmental regulations to the contrary, a rule or regulation is reasonable if it is in accord with the established usages, customs, and traditions of the people, tends to promote public peace and good order, and no rule and regulation which is induced by the general sentiment of the community for whom it is made and upon whom it operates can be said to be unreasonable.

The rule and regulation here involved, to-wit, that equal but separate accommodations shall be furnished to day coach passengers of the white race on the one hand and of the colored race on the other is a reasonable rule and regulation. Passengers aware thereof are under the duty of complying therewith. If they refuse so to do they may be ejected.

The power to regulate interstate commerce is lodged in the Congress and exclusively so. It is not lodged in the Executive or the Judiciary. This power of regulation embraces a vast field containing many various subjects quite unlike in nature. Some of these subjects demand a single uniform rule. Others permit of and, indeed, demand diversity. Whatever subjects demand a single uniform rule or plan of regulation require exclusive legislation by Congress.

The subject with which this case deals, namely, the segregation of day coach passengers is a subject which for seventy-five years the Supreme Court has declared to be one national in nature and requiring a single uniform rule.

That uniform rule can be laid down only by the Congress and now for many decades it has been universally recognized that if the Congress fails to lay down the rule to govern such a matter, then that matter remains free from any restriction; indeed, the very failure of Congress to act is tantamount to an expression that that subject matter shall remain unregulated.

The Congress has not seen fit to act upon this subject of segregation. It has laid down no rule and regulation. Since the matter is one exclusively for Congressional control, the States cannot regulate the matter, for an attempt by a State so to do would be an attempt to interfere in a matter exclusively lodged with the Congress and would hence be a burden on or interference with commerce. Neither the Executive nor the Judiciary can lay down the rule because neither has been vested with power so to do. But commerce cannot operate without a rule governing this subject matter. Either it operates on a basis of segregation or it operates on a basis of no segregation, and that is true whether or not the carriers promulgate written rules, as did petitioner in this case, or whether they simply adopt a custom. Each carrier of necessity has a rule on this subject one way or the other, and if its rule be reasonable in the sense hereinbefore indicated that rule is valid.

The lack of right, power and authority of a State to deal with this subject is absolute. It makes no difference whether the State should seek to compel segregation or to prohibit segregation. It cannot legislate on the subject. Either course would be a burden on commerce and each course has been held by this Court to be a burden on commerce. There is no true analogy between the attempt of a State to legislate in the absence of Congressional regulation, and the attempt by a carrier itself to regulate in the absence of Congressional regulation. If it be conceived as the Circuit Court conceived

that there is an analogy, then the analogy must run all through the situation, and since a State is powerless to require segregation, a railroad could not require segregation; and since a State is powerless to eliminate segregation, a railroad is powerless to eliminate segregation. This produces a clear *reductio ad absurdum*. Of necessity commerce must operate either on a segregated or on a non-segregated basis. Congress which is empowered to make the choice has not made it. The States cannot make the choice because any attempt so to do is invalid as an interference with the exclusive power of Congress and is hence a burden on commerce. The Executive cannot make the choice and has not attempted to do so because he is not empowered to do so. The Judiciary cannot make the choice because it is not empowered so to do. In such a situation only the carrier itself can make the choice.

VI.

ARGUMENT

(a) A Carrier May Adopt Reasonable Rules and Regulations

We think it has never been denied that a carrier not only has the right but is under the duty of adopting reasonable rules and regulations for the conduct of its business and for the convenience, comfort and safety of its passengers. 9 Am. Jur., pp. 503-4; 13 C. J. S., pp. 1801-04; Fetter, Carriers of Passengers, p. 642.

The statement just made of course presupposes that the rule and regulation does not conflict with any valid statute or governmental regulation. In this case there is a complete absence of any such statute or regulation applicable to an interstate passenger by any governmental authority, Federal or State.

Any rules and regulations adopted by the carrier are subject to review by the Courts upon the question whether they are reasonable or discriminatory in character. On the occasion of the first trial of this case before the District Court and upon a charge that clearly set forth the law the jury found the rule and regulation to be reasonable and to have been reasonably enforced by the ejectment of respondent. In its memorandum opinion the District Court held that it had erred in submitting the question of reasonableness to the jury, but that it should have decided the question of reasonableness as a matter of law. It held as a matter of law that the rule was reasonable and accordingly its error in submitting that issue to the jury was harmless. The Circuit Court of Appeals on the first appeal did not hold the rule to be unreasonable. It held that the rule and regulation was void as a burden upon interstate commerce and hence contravened the Commerce Clause of the Federal Constitution.

(b) The Test of Reasonableness

This Court has authoritatively determined what is the test of the reasonableness of the regulations of a carrier in *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71. In referring to an earlier case (*Plessy* v. *Ferguson*, 163 U. S. 537), it pointed out that in that earlier case the test of reasonableness of a statute was set forth and it said:

> "It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs, and traditions of the people,' and the 'promotion of their comfort and the preservation of the public peace and good order,' *this must also be the test of the reasonableness of the regulations of a carrier*, made for like purpose and to secure like results. Regulations which are in-

> duced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable." (Italics supplied)

So far as we are aware, this statement of the test stands today unquestioned.

(c) The Rule and Regulation in Question Is Reasonable

The evidence shows that as early as the 1880's and as the period around 1900 petitioner and other Southern roads have had such a rule and regulation as that here drawn in question. In keeping with that rule special notices are from time to time issued to trainmen, two of which are quoted in full in the first opinion of the Circuit Court of Appeals. This rule and regulation in the field of railroading is the same as that which applies in the fields of schools, busses, street cars, churches, theaters, restaurants, etc., for in those and in many other fields the custom and practice of the people prevailing throughout the whole area in which the Atlantic Coast Line operates has been that of separation. Evidence need scarcely be offered upon that subject for no fact in connection with life in the Southern States, in some of the border states, and elsewhere, is more widely known, more widely discussed, and frequently more widely misunderstood and misinterpreted.

Specifically such a regulation has been traditional with the railroads operating in Virginia and in North Carolina (see testimony of William C. Seibert, Commerce Counsel of the State Corporation Commission of Virginia and of Robert V. Self, formerly Director of Transportation of the North Carolina Utilities Commission). In practice if the cars assigned to one race are full members of that race are seated in cars assigned to the other race, and particularly during the years of the Second World War with the crowded conditions of traffic, it became at times impossible to enforce

the regulation and this condition gave rise to a number of incidents of trouble on the Atlantic Coast Line.

The testimony offered by respondent in no way controverted that offered by petitioner of the custom, practice and sentiment throughout the area. Certain individuals testified to the fact that they did not approve of segregation and on occasions in their travels had seen white persons and Negro persons occupying the same day coach without unpleasant incident. Indeed, their testimony implicitly recognized the custom and practice and makes special note of occasional deviations therefrom. One of such witnesses was Charles E. Smith, who admitted the existence of the custom and tradition.

The evidence also shows that the R. F. & P. Railroad which operates between Washington and Richmond, and some other roads in the State no longer require segregation of day coach passengers.

In like manner the evidence is clear concerning the fact that such regulations are conducive to public peace, good order, and safety.

(d) The Rule and Regulation Here Questioned Does Not Contravene the Commerce Clause of the Federal Constitution.

This Court held in *Morgan* v. *Virginia*, 328 U. S. 373, that a State lacks power to adopt a statute requiring segregation of bus passengers—the white passengers to seat themselves from the front of the bus and the colored passengers to seat themselves from the rear of a bus, thereby causing inconvenience and disturbance. Such a statute is void as a burden upon interstate commerce. Hence, the Court of Appeals in its first opinion pointed out on the authority of that and other cases that *a State* was powerless to require separation by race of interstate passengers

into cars of equal accommodation because such a law would be "an unconstitutional regulation of interstate commerce" and "a burden upon interstate commerce." It pointed out that the effect of the rule and regulation of the carrier here involved is identical with that of such a State statute could the latter be enforced and the Circuit Court said:

> "* * * We know of no principle of law which requires the Court to strike down a state statute which interferes with interstate commerce, but to uphold a railroad regulation which is infected with the same vice."

We submit that the test of the validity of a regulation is not the impact of that regulation upon commerce. The test is not whether in fact the regulation does hinder or hamper commerce; the test is the source from which the regulation emanates. The Constitution clearly states that "the Congress shall have power * * * to regulate commerce * * * among the several states, * * ." That power includes not only the right of Congress to protect commerce from burdens, obstructions and interruptions no matter what may be their source—*Santa Cruz Company* v. *Labor Board*, 303 U. S. 453, 464—but it also includes the right of Congress itself to burden, interfere with, and indeed prohibit commerce—*United States* v. *Darby*, 312 U. S. 100, 113.

The litigation which has come to this Supreme Court has largely involved the validity of Congressional acts in more recent years and of State enactments in earlier years.

The line of demarcation between National and State power was not drawn by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1. He went no further than to hold that:

> "This power, like all others *vested in Congress*, is complete in itself, may be exercised to its utmost extent

and acknowledges no limitations, other than are prescribed in the Constitution." (Italics supplied)

Mr. Justice Frankfurter in his little treatise entitled "The Commerce Clause" refers to the "dormant" power of Congress—that is the unexercised power of Congress to legislate. The great Chief Justice did not in his monumental opinion consider the question whether in the absence of Congressional regulation, the "dormant" power granted to Congress necessarily excluded the exercise by a State of any power in respect to interstate commerce.

That matter was considered and settled in *Cooley* v. *Board of Wardens*, 12 How. 299, 319, the classic statement of the Court being:

> "Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature: some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessity of navigation. * * * Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

This does not mean that where the matter is such as to require one uniform system or plan of regulation, *we must* of necessity have one uniform system, and that if Congress fails to provide it, some other source may provide it. It means that until Congress provides the one uniform system or plan of regulation, the matter is free from restrictions. *Minnesota Rate Cases*, 230 U. S. 352, 400. Chief Justice

Stone thus stated the matter in *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 767:

> " * * * the States have not been deemed to have authority * * * to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, *if any*, be prescribed by a single authority." (Italics supplied)

This does not mean that in such a case the subject matter is withdrawn from regulation by the carrier itself. If it did we would have an impossible hiatus. This Supreme Court has specifically and certainly on four occasions at least dealt with that matter.

In *Welton* v. *Missouri*, 91 U. S. 275, it said that the failure of Congress to legislate "is equivalent to a declaration that interstate commerce shall be free and untrammeled." In *Hall* v. *DeCuir*, 95 U. S. 485, it held that Congressional inaction left the carrier "at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, * * *, as seemed to him most for the interest of all concerned".

In *Western Union* v. *James*, 162 U. S. 650, it stated:

> " * * * The silence of Congress upon such a subject over which it had unquestioned jurisdiction, was equivalent to a declaration that in those respects commerce should be free and unregulated *by any statutory enactment*." (Italics supplied)

The question, the exact question here involved arose in *Chiles* v. *C. & O.*, 218 U. S. 71. This Court said:

> " * * * The Interstate Commerce Clause of the Constitution *does not constrain the action of carriers*, but on the contrary, leaves them to adopt rules and regula-

> tions for the government of their business, free from any interference except by Congress." (Italics supplied)

And again:

> "We have seen that it was decided in *Hall* v. *DeCuir* that the inaction of Congress was equivalent to the declaration that a carrier could, by regulations, separate colored and white interstate passengers".

And indeed so far as *Morgan* v. *Virginia, supra,* deals with the specific matter we are discussing, we think it is in accord, for the case that relied upon was *Hall* v. *DeCuir* and this Court said:

> "Burdens upon commerce are those *actions of a State* which directly enjoin the usefulness of its facilities for such traffic." (Italics supplied)

The two important decisions are *Hall* v. *DeCuir, supra,* and *Chiles* v. *C. & O., supra.* The decision of the Court of Appeals is a repudiation of those two cases, cases which this Supreme Court has never questioned. In the former of those cases the Legislature of Louisiana adopted a law prohibiting segregation in transportation. A steamship company had a rule and regulation requiring segregation which it enforced. The steamship company contended that the State law was invalid and violated the Commerce Clause of the Constitution. This Court held the contention was sound; that a State lacked power to deal with that subject matter, and as pointed out in the quotation above that until Congress should act the carrier was at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat as seemed to him to be most in the interest of all concerned, and it also pointed out that the failure of Congress to

adopt any rule on this subject was in itself legislation that the carrier might make the rule, for the Court said:

> "This power of regulation may be exercised without legislation as well as with it."

This was nothing more than an affirmation of that which Chief Justice Marshall had to say in *Gibbons* v. *Ogden, supra:*

> "All useful regulation does not consist in restraint; and that which Congress sees fit to leave free is a part of its regulation, as much as the rest."

Chiles v. *C. & O., supra,* presented the opposite side of the picture in two respects. In that case, as in the instant case, no State legislation was involved. In that case as in the instant case a railroad had adopted for day coach passengers a rule and regulation identical with that here involved. A colored passenger refused to comply with the rule and regulation and was ejected. He contended that the rule and regulation violated the Commerce Clause of the Federal Constitution. On three occasions heretofore we have quoted from that case. We do not need to repeat the quotations. This Court specifically held that the Commerce Clause did not constrain the action of carriers and that until the Congress might act, each carrier had a right to adopt such rule and regulation as it saw fit.

It may be that this subject matter calls for uniform regulation nationwide. That is a political or legislative question, and not a judicial question, and this is not the forum where it should be argued. The question is whether Congress alone is vested with power to supply the uniform rule or whether in the absence of Congressional legislation, as has been attempted in this case, the Circuit Court of Appeals may

supply the rule. Much more is here involved than the mere matter of segregation of day coach passengers. If the judiciary may lay down the rule on that subject matter they may lay it down either for or against segregation. It has been held in *Southern Pacific* v. *Arizona, supra*, that a State is powerless to prescribe the number of cars which may be placed in one train, that that is a subject matter removed from a State's field of action. If the Court may lay down the rule concerning segregation until Congress acts, it may lay down the rule concerning the number of cars in a train. Just as the President has no inherent authority to seize a business, despite what he may consider to be the gravity of the situation, but that power may be exercised only pursuant to Congressional action, (*Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U. S. 579), so the Courts in the absence of Congressional regulation have no inherent power to lay down the rule either for or against segregation as such.

We have discussed this question of the segregation of day coach passengers under the broad doctrine of the *Cooley Case, supra*. We have done so because it is quite clear that the Court for seventy-five years has considered that this subject of segregating passengers is one national in nature, and, accordingly, under the Cooley rule, if regulated by any governmental authority is to be regulated by Congress alone. In this respect we might point out that we have good authority for considering the Cooley doctrine applicable here. Chief Justice Stone points out in *Southern Pacific* v. *Arizona, supra*, that the case of *Hall* v. *DeCuir, supra*, is an application of the Cooley doctrine. Mr. Justice Black in his dissent in *Hood* v. *Dumond*, 336 U. S. 525, 553, points out that objections to the Cooley rule have been confined to dissents and concurring opinions. He says that in his view the Cooley rule has resulted in the invalidation of State statutes

which should have been left operative unless Congress should see fit to strike them down, and he adds: "but since my views were rejected, I joined in disposition of *Morgan* v. *Virginia*, by application of the Cooley rule."

It may be, though this also is a political or legislative question, that in fact such a rule as is here involved does hinder commerce and create disturbances therein. We have pointed out that that fact is not the test of validity or invalidity but that rather the test is the source from which the rule emanates. This Court in many instances has recognized that those things which are in fact burdens laid upon commerce by commerce itself can be reached only by Congressional legislation. The Sherman Anti-Trust Law and the case of *Addiston Pipe and Steel Company* v. *U. S.*, 175 U. S. 211, are a perfect example of that fact. It was there urged that Congress might interfere in the case of a State, but not in the case of an individual. The private contracts there struck down did directly regulate and restrain interstate commerce. But those contracts were not rendered void *ipso facto* by the Commerce Clause. Congress recognized that such contracts did restrain and interfere with commerce. It struck down those restraints and that interference and it was only when it exercised its "dormant" power that such contracts became illegal.

> "The power to regulate such commerce, that is, the power to prescribe the rules by which it shall be governed, *is vested in Congress, and when Congress has enacted a statute, such as* the one in question, any agreement or combination which directly operates not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent entrenches upon the power of the national legislature and violates the statute."

Accept the view of the Circuit Court that this rule and regulation of the carrier interferes with and burdens commerce. It is only Congress that may strike down that interference and remove that burden because this Court has consistently declared that until Congress acts the carrier is free to adopt its rule and regulation.

We close with an example. No man can question the fact that a strike in a great industry, for instance, in the steel industry, interferes with and goes far to destroy interstate commerce and, hence, those things which bring about a strike are tainted with the same evil. For instance, the refusal of the employer to bargain with his employees. No man will today argue that that refusal does not directly affect commerce, but prior to the time Congress adopted legislation on the subject no Court could have compelled an employer to bargain. The dormant power of Congress existed unexercised. It was only after Congress acted that the Courts could deal with the subject.

We now accept the fact that sub-standard wages burden and interfere with commerce. Congress has seen fit to provide that every man producing goods for commerce shall be paid at least 75¢ per hour for forty hours in one week and time and a half for all hours in excess thereon. Prior to the adoption of the Wage and Hour Law no Court could have compelled an employer to pay any minimum whatsoever. The power was vested in Congress alone and until the dormant power of Congress was exercised, the employer was free to pay whatever he saw fit.

One of the greatest of the living students of our Constitution is Professor Edward S. Corwin. He became outraged by the decisions which set aside the Railroad Retirement Act, the Agricultural Adjustment Act, and the Guffey Coal Act, and in 1936 published a little book which has had great influence on the thought of the country and is entitled

"The Commerce Power versus States Rights". He begins his preface with the statement: " 'Back to the Constitution' is the motto of this small volume,". He concludes the preface with the assertion that: "* * * the Court has transferred to itself a generous slice of Congress's discretion in the exercise of the national legislative power." He was protesting against the denial by this Court in the three cases mentioned of the power of Congress under the Commerce Clause to deal with the subject matters involved in those cases. He was pleading for the broad conception of the Commerce Clause advanced by Chief Justice Marshall. In the next to the last paragraph of the text he states that the power to regulate commerce "is reposed by the Constitution in Congress and not in the Court and so may be exercised for *such objectives as Congress may select to promote,* whether the Court likes them or not." (Italics supplied)

Mr. Corwin was successful in his plea. The broad power of Congress to deal with this matter of commerce has now been recognized by the Court. Mr. Corwin's plea is also apropos of the present situation. Congress has not selected segregation or non-segregation of day coach railroad passengers as an objective to be promoted. That may or may not be wise. Just as this Court in the years since 1936 has held that it does not sit to review the wisdom of the affirmative selection by the Congress of an objective to be promoted and just as in the past it has held that it is not for the Courts to review the discretion of Congress in failing to promote a particular objective, so now that a Circuit Court of Appeals has seen fit by its decree to promote what it thinks should be the national objective, this Court should again step in to protect and preserve the age-old view of our Constitution that the power to regulate is vested in Congress alone, is complete in itself, may in the discretion of Congress be exercised to its utmost extent or not exercised at all, and until

exercised by Congress may not be dealt with by any governmental authority known to the American people.

CONCLUSION

It is accordingly submitted that a writ of certiorari should be granted petitioner and that this Court should review the decision of the Court of Appeals for the Fourth Circuit and reverse the same and remand the case to it with the directions for which prayer is made in the accompanying petition.

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No. 380

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In The
Supreme Court Of The United States

October Term 1952
Misc. No.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

WILLIAM C. CHANCE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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